No. 84-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL

and

CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Petitioners,

—v.—

DOUGLAS JAMES SCANLON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA AS AMICI CURIAE SUPPORTING AFFIRMANCE

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 members dedicated to the protection of civil liberties and civil rights. The ACLU Foundation of Southern California is a state affiliate of the ACLU. Either as counsel for a party or as *amicus curiae*, the ACLU has frequently asserted the federal statutory and constitutional rights of handicapped persons. The ACLU has also previously filed briefs in this Court concerning the proper scope of the Eleventh Amendment.

With the consent of the parties, indicated by letters we have lodged with the Clerk of the Court, we file this brief *amici curiae* to bring our experience to bear on the important questions presented by this case.

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STATEMENT OF THE CASE

In November 1979, Douglas Scanlon filed this suit in a California federal district court against the Atascadero State Hospital and the California Department of Mental Health.[1] He

1. The summary of the case in this statement is drawn from Scanlon's complaint. *See* J.A. 2-23. Since the case arises on a motion to dismiss, the allegations of the complaint are taken to be true for purposes of this proceeding. *See Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 740 (1976).

(footnote continued on following page)

alleged in his complaint that he suffers from diabetes mellitus and loss of vision in one eye, that in February 1978 he applied for a position as a graduate student assistant in recreation therapy at Atascadero Hospital, and that after a physical examination, the hospital withdrew a job offer it had made because his diabetes was "uncontrolled" and because he lacked vision in one eye.

Scanlon then complained to the regional Office of Civil Rights of the Department of Health, Education and Welfare. That office determined that the withdrawal of the job offer violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which provides that "[n]o otherwise qualified handicapped individual . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." When conciliation efforts failed, the present action to redress the violation was brought.[2] The complaint prayed for a declaratory judgment and injunctive relief, as well as backpay, "any further compensatory damages," costs, and reasonable attorney's fees.

The defendants' motion to dismiss was granted by the district court on the grounds (1) that Section 504 did not prohibit discrimination against the handicapped in a federally assisted activity unless a primary purpose of that federal assistance was to provide employment, and (2) that the action was barred by the Eleventh Amendment. The Court of Appeals affirmed on the first of these grounds, 677 F.2d 1271 (9th Cir. 1982), but after the decision in *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248 (1984), this Court vacated and remanded for reconsideration. 104 S. Ct. 1583 (1984). On remand, the Court of Appeals concluded (1) that under *Darrone*, Section 504 was applicable even if the primary purpose of the federal assistance was not to provide employment, and (2) that the suit was not barred by the Eleventh Amendment.

The Department of Mental Health is the state agency responsible for supervising and administering the Atascadero Hospital. Both defendants allegedly receive funds from the federal government.

2. Scanlon also alleged in his complaint that the defendants' actions violated two California statutes.

735 F.2d 359 (9th Cir. 1984). The latter determination is now before this Court for review.

SUMMARY OF ARGUMENT

The Rehabilitation Act of 1973 and its amendments represent a major effort by Congress to deal with one of the enduring social problems of our day—that of enabling the handicapped to lead full and useful lives. As an essential part of this effort, Congress prohibited discrimination against the handicapped not only by federal agencies and contractors but also by all recipients of federal financial assistance, and authorized a private remedy against any recipient who violated that prohibition.

The language and legislative history of the act and its amendments demonstrate that the states and their departments, as principal recipients of federal assistance, fall within the scope of that statutory prohibition and of the private remedy afforded for its violation. Thus Congress, acting pursuant to its constitutional power under Section 5 of the Fourteenth Amendment and the spending clause of Article I, has effectively abrogated Eleventh Amendment immunity when such a remedy is sought.

Since congressional abrogation of Eleventh Amendment immunity in this case is based in substantial part on congressional power under the Fourteenth Amendment, state consent to suit is not required in order for the abrogation to be effective. Even if consent were required, it may properly be inferred from continued state acceptance of federal financial assistance with full notice of the conditions imposed on acceptance by federal law.

Although existing law supports the conclusion that California and its departments may not claim immunity in this action, the present state of Eleventh Amendment doctrine is complex and confusing. Recent studies have laid the foundation for an interpretation of the Amendment that is more closely tied to its language and intended purpose, and the present case provides an excellent vehicle for reconsidering existing doctrine and

clarifying this important area of constitutional law. Properly applied, the Eleventh Amendment is not a bar to this action because (1) it is not a suit against a state by a citizen of another state, and (2) federal jurisdiction is based not on the identity of the parties but on the presence of a federal question. The remaining issue—whether the state may claim its common law immunity from an unconsented suit—raises a straightforward question of statutory construction to be decided on the basis of the language and purpose of the relevant law. Here, that immunity must yield to the congressional decision to provide a federal forum for the effective vindication of federal rights.

ARGUMENT

I. Congress Has Effectively Abrogated Eleventh Amendment Immunity in Private Suits for Violation of Section 504 of the Rehabilitation Act.

Under existing precedent, a state may claim Eleventh Amendment immunity from private suit in a federal court even if the suit is brought by a citizen of that state, and even if the basis of jurisdiction is that the action arises under federal law. *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890); *Edelman v. Jordan*, 415 U.S. 651 (1974).[3] But this Court has recognized the power of Congress, when acting under Section 5 of the Fourteenth Amendment, to abrogate that immunity in order to implement the Amendment's requirements. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Moreover, the Court has upheld

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3. It is not entirely clear whether this conclusion is derived directly from the Eleventh Amendment or indirectly from the doctrine of sovereign immunity which the Eleventh Amendment is said to reflect. For simplicity, the rule will be referred to here as one of Eleventh Amendment immunity.

In the present case, the only defendants are agencies of the state; no state officials have been joined. Thus if Eleventh Amendment immunity applies, none of the relief sought may be obtained, even though some aspects of that relief might be available in a suit against state officials. *Compare Alabama v. Pugh*, 438 U.S. 781 (1978), *with Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977).

congressional action subjecting a state to suit as part of the exercise of other powers delegated to Congress, at least when the conduct of the state can fairly be said to constitute consent. *See, e.g., Parden v. Terminal Railway*, 377 U.S. 184 (1964).[4]

Congress, in the relevant sections of the Rehabilitation Act, has effectively exercised this power to abrogate Eleventh Amendment immunity. This statute represents a major legislative effort to protect the handicapped against discrimination and thus to ensure to them the equal protection of the laws guaranteed by the Fourteeth Amendment. An essential aspect of this effort is the authorization of a private remedy against any recipient of federal funds who engages in prohibited discrimination. And like the other important civil rights statutes on which it is patterned,[5] the Rehabilitation Act is significantly directed at the states themselves as principal recipients of federal funds.

Congressional authority to enact Section 504, as it applies to the states and their departments, rests not only on Section 5 of the Fourteenth Amendment but also on the spending power in Article I, Section 8. Whether or not Congress has authority to abrogate state sovereign immunity without state consent in action taken under the spending power, continued acceptance of federal assistance by a state after Congress has made its purpose clear constitutes effective consent to the bringing of a citizen suit in federal court.

These conclusions are not simply appropriate to the interpretation of the Rehabilitation Act. They are essential if the worthy purpose of that statute is to be realized.

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4. *Cf. Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979) (power of Congress under the copyright and patent clause of Article I, Section 8).

5. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq. See Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir. 1981) (noting "virtual identity between the discrimination provisions of Section 504 and those of Title VI and Title IX").

A. *Congress Has Authorized a Private Remedy for Violation of Section 504 Against All Recipients of Federal Assistance, Including the States and Their Departments.*

As originally enacted in 1973, the Rehabilitation Act envisioned a far-reaching program to increase opportunities for the handicapped—by providing programs and funding to the states, by authorizing federal agencies to implement the act, and by imposing obligations on federal agencies, federal contractors, and recipients of federal funds. The prohibition of discrimination in Section 504 formed a critical part of this vision. As Senator Taft, a member of the Committee on Labor and Public Welfare, stated (119 Cong. Rec. 24587 (1973)):

> [I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote all our energy toward the elimination of the most disgraceful barrier of all—discrimination.

The 1973 Act did not expressly provide for private enforcement of the duties imposed by Section 504, but Congress left no doubt of its purpose on this score when it enacted a series of amendments to the Act in 1974. The Senate Report accompanying those amendments, S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974), noted that Section 504 was almost identical to the anti-discrimination provisions of Title VI of the 1964 Civil Rights Act, § 601, 42 U.S.C. § 2000d, and Title IX of the 1972 Education Amendments, § 901, 20 U.S.C. § 1681, and then continued:

> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach . . . would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, *and permit a judicial remedy through a private action.* (Emphasis added.)

If the history of this statute ended here, some question might be raised about the demonstration of congressional purpose, since the clearest evidence was a statement in a committee report issued a year after Section 504 was enacted into law.[6] But Congress went on in the course of further amendments in 1978 to make its purpose explicit. After hearings that focused in significant part on the need for an express private remedy and for recovery of attorney's fees by successful litigants,[7] Congress added a new Section 505, 29 U.S.C. § 794a. This section provides that the remedies, procedures, and rights in Title VI of the 1964 Civil Rights Act "shall be available to any person aggrieved by any act or failure to act by *any recipient* of Federal assistance" under section 504, 29 U.S.C. § 794a (a)(2) (emphasis added), and further provides that in any action to enforce the act, the court has discretion to allow "the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," 29 U.S.C. § 794a(b).

Senator Cranston, the author of the attorney's fee provision, explained its purpose in detail on the floor of the Senate, saying that "[p]rivate enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform." 124 Cong. Rec. 30346 (1978).

The reference in Section 505 to Title VI of the 1964 Civil Rights act is especially significant. Although Title VI did not explicitly provide a private remedy for its violation, federal courts, including this Court, have consistently found such a

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6. This Court has recently noted, however, that since the 1974 amendments were "virtually contemporaneous" with the 1973 Act, "the amendments and their history do shed significant light on the intent with which § 504 was enacted." *Alexander v. Choate*, 53 U.S.L.W. 4072, 4077 n.27 (U.S. Jan. 9, 1985).

7. *See Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. (1977).

remedy to be available,[8] and Congress in 1974 and again in 1978 acted on the understanding that the remedy did exist.[9]

The reference to Title VI also underscores the intent of Congress to make this private remedy available against the states and their departments. The major purpose of Title VI was to end discrimination on the basis of race, gender, and national origin by state and local governments, the principal recipients of federal funds. As Senator Javits stated during the debates, "We are primarily trying to reach units of government, not individuals." 110 Cong. Rec. 13700 (1964); *see also id.* at 10075-76 (Letter of Attorney General Kennedy to Senator Cooper stating that "it is to discrimination by such State and local agencies that title VI is basically directed.").

Indeed, the language of Section 505 itself leaves no doubt of Congress's intent. The provision authorizes a remedy against "any recipient" of federal funds, and regulations issued by the Department of Health, Education and Welfare in 1977 had explicitly defined "recipient" to include "any state or its political subdivision, any instrumentality of a state or its political subdivision . . . or any person to which Federal financial assistance is extended . . ." 42 Fed. Reg. 22677 (May 4, 1977), 45 C.F.R. § 84.3(f). And the Senate Report accom-

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8. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

9. *See* S. Rep No. 1297, 93d Cong., 2d Sess. 39-40 (1974); S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); *cf. Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) ("We have no doubt that [in 1972] Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.").

The United States suggests in its *amicus* brief in this Court, U.S. Br. at 13, that Congress may have had some question in 1978 about the availability of a private remedy under Title VI. This suggestion is rebutted by the legislative history of the amendments. As noted by the United States in its *amicus* brief in support of Scanlon in the court below (p. 33): "When Section 505(a)(2) was enacted in 1978, Congress understood that Title VI provided a private cause of action and intended, as it had indicated in 1974, that such a remedy should be available under Section 504."

panying the 1978 amendments expressly referred to these regulations and to their conformity with regulations promulgated under Title VI. *See* S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).[10]

Finally, Senator Cranston, in his remarks on the floor of the Senate, spoke directly of actions against states to enforce Section 504:

> [W]ith respect to State and local bodies or State and local officials, attorney's fees . . . would be collected from the official . . . or from the State or local government—regardless of whether such agency or government is a named party. The authorization of attorney's fees under proposed § 505(b) in cases brought to enforce title V is within the power of Congress under among other things, section 5 of the 14th Amendment. Thus, in accordance with the Supreme Court's decision in *Hutto v. Finney* [437 U.S. 678 (1978)], the 11th Amendment is no bar to the recovery of attorney's fees under proposed section 505(b) . . .[11] 124 Cong. Rec. 30347 (1978).

This Court has held that congressional purpose to abrogate Eleventh Amendment immunity must be clearly shown. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 343-45 (1979). But the

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10. This Court has on several occasions recognized these regulations as an important source of guidance on the meaning of the 1978 amendments. *See, e.g., Alexander v. Choate*, 53 U.S.L.W. at 4076 n.24.

11. Both the petitioner and the United States (in its *amicus* brief in this Court) seek to minimize the importance of this statement by pointing to its emphasis on fee awards. This effort to distinguish away even a direct reference to the abrogation of the Eleventh Amendment must fail. Senator Cranston's point was that attorney's fees could be recovered from state funds under this section whether or not a Title V enforcement action was brought directly against the state as a "named party." His assumption that an enforcement action could be brought against the state as a named party in an appropriate case is consistent only with congressional abrogation that is broader than the mere authorization of fees; in the absence of such abrogation even prospective relief may be sought only against individuals. *See Alabama v. Pugh*, 438 U.S. 781 (1978).

Court has never held that abrogation of immunity must be stated in so many words in the text of the statute in order to be effective. On the contrary, the Court has found legislative abrogation even in the absence of express statutory language. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978). And despite petitioner's efforts to explain *Hutto* as a case relating solely to litigation costs, the Court in that case emphasized that its refusal to require express abrogation would have obtained "[e]ven if we were not dealing with an item such as costs." *Id.* at 698 n.31.[12]

To insist on greater specificity than exists in this case would be to demand a degree of precision that can only frustrate the effectuation of congressional purpose. Congress provided for § 504 actions against state agencies because the availability of a private remedy against an offending state is critical to the fulfillment of the goals of Section 504. The states and their departments head the list of federally assisted grantees, and the alternative tool of administrative enforcement—a cutoff of federal funds—is too Draconian to be useful in all but the most flagrant and pervasive instances of unlawful conduct.

In its *amicus* brief in this Court, the United States attempts to make the requirement of specificity even more onerous and unrealistic. It is not sufficient, the United States suggests, for the language and history of a statute to make clear the purpose of Congress to abrogate immunity and to subject the state to

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12. The Court in *Hutto* pointed to the strength of the legislative history and to the source of congressional action in Section 5 of the Fourteenth Amendment. Cases in which greater emphasis has been put on the importance of express language, *e.g., Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981), have not been cases in which Congress was legislating in the exercise of authority under Section 5. *Cf. Parden v. Terminal Railway*, 377 U.S. 184 (1964) (subjecting state to suit under the Federal Employers Liability Act).

suit; Congress "must clearly express an intention to permit *retrospective damage suits* in federal court if it so intended." U.S. Br. at 16 n.10 (emphasis added). This argument contains two flaws. First, it relies on cases in which congressional authority to legislate did not derive from Section 5 of the Fourteenth Amendment. *See supra* note 12. Second, even cases in which Congress undeniably intended to authorize suit would often fail this test. For example, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Congress had not explicitly provided that states were subject not only to actions for prospective relief for violations of Title VII but also to the monetary awards authorized in 42 U.S.C. § 2000e-5(g). Yet the Court quite properly held that Congress had intended to subject states to such suits, and in so holding the Court gave full effect to the legislative purpose.[13]

B. *Congressional Abrogation of Eleventh Amendment Immunity in This Case Does Not Require State Consent to Be Effective.*

When Congress abrogates Eleventh Amendment immunity in the exercise of its power under Section 5 of the Fourteenth Amendment, state consent to that abrogation is not required. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978). Indeed, if consent were a condition of abrogation in this circumstance, effective implementation of the Fourteenth Amendment might be held hostage to the will of the states themselves.

For the first time, petitioners have suggested in their brief in this Court that authority for application of the Rehabilitation Act to the states does not derive from Section 5 but only from

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13. Since only state agencies and not state officials have been sued in the present action, the Eleventh Amendment, if applicable, may bar all claims for relief, prospective as well as retrospective. *See supra* note 3. The United States recognizes, U.S. Br. at 16 n.11, that this inappropriate consequence may flow from acceptance of its argument that Congress has not done enough to make clear its desire to subject the states to suits for retrospective relief.

the spending power in Article I. But there is no doubt that the desire of Congress to secure equal protection of the laws for the handicapped was an important basis of this legislation. This idea was expressed by several sponsors of the original proposals out of which the Act evolved,[14] as well as by Senator Cranston in the remarks quoted above, *see supra* at 9. Moreover, the Act's provisions, which are based on extensive consideration of the denial of opportunity to the handicapped by governmental and private agencies, are intimately related to the protections afforded by the Education Acts, 20 U.S.C. §§ 1401 *et seq*. And the origin of those laws in the Fourteenth Amendment has been judicially recognized. *See, e.g., Parks v. Pavkovic*, 536 F. Supp. 296, 306-11 (N.D. Ill. 1982).

The case is thus similar to *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which the Court concluded that the basis of the congressional program there at issue lay in the commerce power as the program related to private contractors and in "the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees." 448 U.S. at 475.[15]

C. *If State Consent is Required, It May Be Inferred From the Continued Acceptance of Federal Assistance With Notice of the Conditions Imposed by Federal Law.*

Even were the Court to conclude that Congress has not here legislated under Section 5 of the Fourteenth Amendment, the state's claim to immunity should not succeed. Assuming arguendo that the spending power in Article I, Section 8 were the

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14. As noted in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280 n.9 (7th Cir. 1977), Section 504 had its genesis in an attempt in 1971 and 1972 by Representative Vanik and Senator Humphrey to amend Title VI. The remarks of those sponsors, as they relate to the Fourteenth Amendment, may be found at 117 Cong. Rec. 45974-75 (1971) and 118 Cong. Rec. 525 (1972).

15. The Court has made it clear that an express statement by Congress of reliance on Section 5 is not required. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

sole source of congressional authority for this statute, the decisions of this Court do not clearly determine the question whether abrogation of immunity must be accompanied by state consent to suit in order to be effective. *See, e.g., Parden v. Terminal Railway*, 377 U.S. 184 (1964); *Edelman v. Jordan*, 415 U.S. 651 (1974).[16] But even if state consent is required, it is clear that in appropriate cases consent may be inferred from conduct. Here, a critical combination of factors is present. First, Congress has legislated a private remedy against a class of persons ("recipients" of federal assistance) which in terms embraces the states and indeed highlights their inclusion. In this respect, the case differs from *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). Second, the state agencies that are defendants in this case have continued not only to carry on the normal business of government but also to accept federal assistance in the very programs and activities that are the subject of this suit. In this respect, the case differs from *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973). The state has therefore acted with full understanding of the consequences of its actions and with complete freedom to reject federal aid if those consequences are unacceptable. Thus the requisites of knowing consent have been made out.[17]

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16. *Cf. Peel v. Florida Dep't of Transportation*, 600 F.2d 1070 (5th Cir. 1979) (analyzing Supreme Court authority and suggesting that state consent is not required when abrogation of immunity is based on exercise of the war power, Art. I, Section 8).

17. Indeed, it is noteworthy that the state of California, whose departments are defendants in this case, participated as an *amicus* supporting the suit of a private person under § 504 against a state agency in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Since the named defendant in that case was a state agency, an Eleventh Amendment question could have been raised, even if the sole relief sought was prospective in nature.

Moreover, given that an Eleventh Amendment defense "partakes of the nature of a jurisdictional bar," *Edelman v. Jordan*, 415 U.S. at 678, this Court could have raised the Eleventh Amendment issue in that case on its own motion. However, this Court did not do so.

II. This Case Affords an Opportunity to Clarify the Scope and Application of the Eleventh Amendment.

As shown in Part I, existing precedent fully supports the conclusion that the present suit may be brought against the state of California and its departments in a federal court. But as many commentators have observed, the present state of Eleventh Amendment jurisprudence is complex, uncertain, and confusing.[18] For example, there is uncertainty about the degree of precision required for congressional abrogation of Eleventh Amendment immunity under grants of legislative power other than that in the Fourteenth Amendment, about the necessity of state consent to suit, and about the kinds of state behavior that may constitute consent in particular contexts. Moreover, individual Justices have expressed wide disagreement about the relationship of the doctrine of sovereign immunity, the Eleventh Amendment, and other provisions of the Constitution. See, for example, the several opinions in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), and in *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900 (1984).

At the same time, an outpouring of scholarly research in recent years has cast new light on the purpose and scope of the Eleventh Amendment and on the place of sovereign immunity doctrine in constitutional law.[19] This research strongly suggests

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18. *See* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1 (1972); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. Pa. L. Rev. 515 (1977) (Part I), 126 U. Pa. L. Rev. 1203 (1978) (Part II); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. Ill. L. Rev. 423; Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61 (1984).

19. *See* authorities cited *supra* note 18, especially Engdahl, Field, Gibbons, and Orth.

that state sovereign immunity was not viewed by the Framers as a constitutional limitation on federal judicial power either before or after adoption of the Eleventh Amendment. It further suggests that the Eleventh Amendment itself should not be given an expansive interpretation that bears little relationship to its text. Rather it should be read, in accordance with its language, as an amendment drafted by the Federalists "in the narrowest possible form that would serve to quiet the rapidly mobilizing reaction to *Chisholm* [*v. Georgia*, 2 Dall. (2 U.S.) 419 (1793)], while leaving intact the rest of article III,"—an amendment that would "reach cases such as *Chisholm*—over which the Supreme Court's jurisdiction was original and based solely on party status but leave intact the clauses in article III, section 2 dealing with subject matter jurisdiction, especially federal question jurisdiction." Gibbons, *supra* note 18, at 1934.

Under this approach, the Eleventh Amendment would apply to bar a federal court suit *only* when the asserted basis of jurisdiction was that the defendant was a state and the plaintiff was a citizen of another state. Indeed, no Supreme Court decision before *Hans v. Louisiana*, 134 U.S. 1 (1890), gave the Amendment a broader reading, and the revisionism of the *Hans* decision was born out of the political controversy over repudiation of state debts in the aftermath of Reconstruction.[20] *See* Gibbons, *supra* note 18, at 1968-2003.

This recent scholarship provides a firm foundation for a restatement of the significance of the Eleventh Amendment and of sovereign immunity doctrine. Neither the Amendment nor the doctrine erects a constitutional barrier to congressional authorization of suit against a state in a federal court when that authorization is incidental to the proper exercise of any delegated power. There is no warrant for any requirement of

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20. *Hans* was the first Supreme Court decision to hold that the Constitution barred a suit against a state by one of its own citizens. (There is some support for the view that even *Hans* did not hold that such a suit was constitutionally precluded, but subsequent decisions have plainly regarded it as standing for that proposition. *See* Field, *supra* note 18 (Part I), at 536-46 & nn. 81, 86.)

extraordinary and virtually unattainable specificity in draftsmanship or of "consent" on the part of the state when federal power is duly exercised. The question whether Congress has overridden a state's common law immunity from suit is, like any other question of statutory construction, one that involves the careful ascertainment of legislative purpose.

Existing precedent of this Court is in important ways consistent with this approach, though it often looks in conflicting directions. For example, while these *amici* believe that last Term's sharply divided decision in *Pennhurst*, *supra*, reached an unfortunate and unnecessary result, we also believe that the majority's rationale supports a fresh approach to the scope of federal authority. The great case of *Ex parte Young*, 209 U.S. 123 (1908), the *Pennhurst* Court said, rested not on the "fiction" that a government official acting in violation of law was stripped of his official authority, but rather on the clear need "to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.' " 104 S. Ct. at 910 (quoting *Ex parte Young*, 209 U.S. at 160). Recognition that the Eleventh Amendment need never be a barrier to the attainment of that goal—the effective vindication of federal rights—would thus harmonize with this understanding of *Ex parte Young's* rationale.[21]

We submit, therefore that the time and occasion are ripe for the Court, at the least, to clarify the authority of Congress to subject the states and their departments to federal court suit.[22]

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21. Moreover, recognition that state sovereign immunity is not mandated by any provision of the Constitution would be fully consistent with this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), which allowed the state of Nevada to be sued in a California court without Nevada's consent. *See* Shapiro, *supra* note 18, at 79-80.

22. This case also affords an opportunity to rule that when the doctrine of *Ex parte Young* permits a federal court suit for prospective relief in order to vindicate federal rights, that relief may be sought not only against public officers "in their individual capacity" but also "in their official capacity," i.e., against the state itself. The current rule, reflected in *Alabama v. Pugh*, *supra* note 3, often serves as a procedural trap for the unwary.

More fundamentally, we believe the occasion is an appropriate one to reconsider the rationale of the decision in *Hans v. Louisiana*, *supra*,[23] and to hold that the Eleventh Amendment does not apply to the present suit for two independent reasons: (1) the suit is not one brought against a state by a citizen of another state, and (2) federal jurisdiction is based not on party identity but on the presence of a federal question. When the Eleventh Amendment issue is thus stripped away, the question whether the State of California can be sued without its consent, despite the traditional immunity of the state from suit, becomes a straightforward question of statutory construction which should be answered in the affirmative for reasons stated in Part I of this brief.

We have not set forth in full the historical and analytical bases for these conclusions because the relevant studies are readily at hand and because we are not sure whether the Court will find it necessary or appropriate to follow this course. But if the Court wishes to have fuller briefing and argument of these questions, we suggest that it set the case for reargument and ask the parties and *amici* to address the question whether the rationale of *Hans v. Louisiana* and related decisions should now be reconsidered.

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23. Even if the rationale of *Hans* is reconsidered along the lines suggested here, alternative grounds would support the result in that case. *See* Field (Part II), *supra* note 18, at 1266.

CONCLUSION

For the foregoing reasons, we urge that the decison below be affirmed. If the Court believes that the case affords an opportunity for reconsideration of the rationale of *Hans v. Louisiana* and related decisions, the Court may wish to set the case for reargument and ask the parties and *amici* to address these fundamental questions of Eleventh Amendment doctrine.

Respectfully submitted,

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